U.S. Department of Labor

Office of Administrative Law Judges
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CASE NOS.: 2000-LHC-03381, 2000-LHC-03382, 2000-LHC-03383, 2001-LHC-01667, 2001-LHC-01668, 2001-LHC-01669, 2001-LHC-01670, 2001-LHC-01671, 2001-LHC-01672, 2001-LHC-01673, 2001-LHC-01674, 2001-LHC-01675, 2001-LHC-01676

OWCP NOS.: 01-127510, 01-149177, 01-149178, 01-149179, 01-149180, 01-149181, 01-149182, 01-149206, 01-149207, 01-149208, 01-149209, 01-149210, 01-149211

In the Matter of

SAMUEL B. TUCKER, JR.
Claimant

v.

GENERAL DYNAMICS CORPORATION/
ELECTRIC BOAT CORPORATION,
UNITED STATES STEEL LLC,
STANDARD STRUCTURAL STEEL,
and THAMES VALLEY STEEL
Employers

and

INSURANCE COMPANY OF NORTH AMERICA/ ACE USA,
LIBERTY MUTUAL INSURANCE COMPANY,
and THE HARTFORD INSURANCE COMPANY
Carriers

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Samuel B. Tucker, Jr. *pro se*

Edward W. Murphy (Morrison, Mahoney & Miller),
Boston, Massachusetts, for General Dynamics
Corporation/Electric Boat Corporation

Richard N. Curtin and Scott E. Richardson (Curtin, Murphy
& O'Reilly), Boston, Massachusetts, for United States Steel LLC

James D. Moran, Jr. (Maher & Williams), Fairfield,
Connecticut, for Thames Valley Steel and
Liberty Mutual Insurance Company

Jean Shea Budrow (Latronico, Black, &Whitestone),
Boston, Massachusetts, for Standard Structural Steel and
Liberty Mutual Insurance Company

Michael J. McAuliffe (Pomerantz, Drayton, & Stabnick),
Glastonbury, Connecticut, for Electric Boat Corporation and
Insurance Company of North America/ACE USA

David Kelly (Monstream & May), Glastonbury,
Connecticut, for Thames Valley Steel
and The Hartford Insurance Company

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS
AND DENYING SPECIAL FUND RELIEF

I. Statement of the Case

This case arises from claims for workers' compensation benefits filed by Samuel B. Tucker, Jr. ("Tucker") under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. (the Act), against his former employers, General Dynamics Corporation/Electric Boat Corporation ("EBC"), United States Steel LLC ("US Steel"), Standard Structural Steel ("SSS") and Thames Valley Steel ("TVS"), and their respective insurance carriers, the Insurance Company of North America/ACE USA ("ACE") which insured EBC, the Liberty Mutual Insurance Company ("Liberty Mutual") which insured SSS and TVS and the

Hartford Insurance Company ("Hartford") which also insured TVS.[1] The claims were not resolved during informal proceedings before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP") who referred the matter to the Office of Administrative Law Judges ("OALJ") for a formal hearing.

The formal hearing was convened in New London, Connecticut on March 19, 2001. Tucker appeared at the hearing *pro se*, and appearances were made by counsel on behalf of EBC and its carrier ACE; US Steel; SSS and its carrier Liberty Mutual; and TVS and its carrier Hartford. Tucker attempted to introduce a large volume of documentary evidence, but did not have copies for any of the respondents who moved to adjourn the hearing on the ground that they had not previously been served with any of Tucker's documentary evidence and, as a result, were not prepared to defend the claims as they had not had an opportunity for discovery. In light of Tucker's *pro se* status, the Court stated that it would organize and mark his proposed exhibits for identification, make copies of the exhibits and provide copies to the respondents' attorneys. In addition, it was agreed among the parties that Tucker would appear for a deposition on April 25, 2001, and the Court granted Tucker's unopposed request that it supervise the taking of the deposition to allay his concerns with facing multiple attorneys without representation. Finally, by agreement of the parties, the hearing was adjourned to the week of July 11, 2001, and Tucker's offer of evidence was taken under advisement pending duplication of the exhibits for the respondents and establishment of a time frame for filing any objections. Thereafter, the hearing was further continued to September 26, 2001 to allow completion of the discovery process.

The hearing reconvened in New London on September 26, 2001, at which time all parties again appeared and had an opportunity to present evidence and oral argument. The Director, OWCP did not appear at the hearing as its legal counsel, the Office of Solicitor of the Department of Labor, advised by letters dated August 10, 2001, and August 24, 2001, that it had received notice of the applications for Special Fund relief filed by some of the respondents pursuant to 33 U.S.C. § 908(f) and did not wish to participate in the hearing. Administrative Law Judge Exhibits ("ALJX") 32 and 36. Tucker testified at the hearing, and documentary evidence was provisionally admitted as EBC Exhibits ("EBCX") 1-24 and US Steel Exhibits ("USX") 1-16, subject to any objection from Tucker post-hearing. Hearing Transcript ("TR") 36-45.[2] November 9, 2001 was set as the date for filing any objections to proposed exhibits, and Tucker was allowed until November 30, 2001 to file any response to the respondents' objections. TR 59, 95. Further, Tucker agreed to EBC's request that he appear for a medical examination on October 29, 2001. TR 52-53.

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[1] As discussed in greater detail below, US Steel is self-insured and EBC was also a self-insurer during some of the time covered by Tucker's claims.

[2] Documentary evidence will be referred to herein as "CX" for an exhibit offered by the Tucker, "EBCX" for an exhibit offered by the Electric Boat Corporation, "USX" for an exhibit offered by US Steel, "ACX for an exhibit offered by ACE, and "ALJX" for the formal papers. References to the transcript of the hearing will be designated as "TR".

Subsequent to the September 26, 2001 hearing, motions for summary decision were filed by EBC and by SSS and Liberty Mutual. ALJX 48, 62. EBC's motion was denied by order issued on November 29, 2001, and the motion filed by SSS and Liberty Mutual was taken under advisement. ALJX 86. In addition, Tucker failed to appear for the medical examination which had been rescheduled by EBC to address Tucker's transportation concerns, and EBC responded by filing a motion to dismiss which was joined by TVS and SSS. ALJX 64-66. Tucker was ordered to show cause why his claims should not be dismissed for failure to appear for the examination. ALJX 89. Based on Tucker's response to this order, ALJX 69, the Court found that sufficient cause had been shown, and the motion to dismiss was denied by order issued on April 9, 2002. ALJX 92. The hearing was then reconvened on July 25, 2002, at which time all parties again appeared, and further testimony was elicited from Tucker. Several new exhibits were offered by Tucker and by EBC and ACE. Some of the exhibits were admitted, but the majority were taken under advisement in view of multiple objections. By agreement of the parties, the record was held open at the conclusion of the hearing to allow the parties to develop and offer additional evidence, primarily related to Tucker's employment history.

The post-hearing process of evidentiary development became protracted as a number of issues arose between Tucker and the respondents regarding Tucker's attempts to obtain evidence relating to his employment history and exposure to hazardous materials. The record was eventually closed on May 15, 2003, and the parties were granted leave until June 15, 2003 to file written closing argument which were timely submitted by all respondents.

After careful analysis of the evidence contained in the record, I find that

My findings of fact and conclusions of law are set forth below.

II. The Claims and Issues Presented

Tucker's first claim (OWCP No. 01-127510) was filed by an attorney on May 18, 1993 against EBC and alleges an injury prior to April 1, 1993 based on "lung irritants including asbestos." CX 1(rr). Tucker introduced a second claim form bearing the same OWCP case number which alleges disability from occupational disease caused by multiple work site and employer exposures to airborne asbestos and other hazardous materials and names "General Dynamics, Thames Valley Steel and others" as employers. CX 5(ff). This latter form is undated, but the OWCP administrative records contain a filing date of May 24, 1993.[3] In March 2000, Tucker filed 12 additional claims in OWCP Nos. 01-149177-149182 and 01-149206-149211 against EBC and TVS as well as US Steel and SSS, alleging that he suffers from asbestos-related lung disease, thoracic outlet syndrome and traumatic arthritis, and injuries to multiple organs including his intestines, liver, spleen, kidney and gall bladder, all of which he alleges to be attributable to his exposure to asbestos and other hazardous substances and to vibrating tools

[3] The record does not indicate whether TVS was served with this claim, though it is noted that TVS did not participate in Tucker's 1996 deposition.

during the course of his employment with the various respondents. CX 3 (i)-(u). *See also* CX 1(f). Tucker alleges that he has been totally disabled by occupational diseases since 1985, and he seeks an award of compensation for lost earning capacity, medical care and vocational rehabilitation services. ALJX 1.

The respondents assert a number of defenses to the claims including the statute of limitations, lack of jurisdiction and lack of causal relationship between any of Tucker's medical conditions and his employment. Each of the respondents alternatively argues that even if these issues are resolved in Tucker's favor, one of the other respondents is liable for any benefits awarded under the last responsible employer rule. Finally, SSS and Liberty Mutual and TVS and Hartford seek relief from any liability under the Act's Special Fund provisions.

III. Findings of Fact and Conclusions of Law

A. Admission of Evidence

EBC and TVS have objected to much of Tucker's voluminous documentary evidence, essentially on grounds of relevance and authenticity. ALJX 54, 55. As the parties were informed on several occasions during the hearing, statutory or common law rules of evidence are not binding in hearings conducted under the Act; 33 U.S.C. § 923(a); and an ALJ has considerable discretion in conducting hearings in a manner that will best ascertain the rights of the parties. 20 C.F.R. § 702.339. *See also Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147, 152 (1997). Considering Tucker's status as an unrepresented claimant, I find that the respondents' objections are best addressed in terms of the weight to be accorded to the documents in question rather than their admissibility. Accordingly, the objections are overruled, and Tucker's exhibits CX 1-11 have been admitted.

Tucker raised some non-specific objections to documentary evidence offered by EBC and INA. Having reviewed the record, I find that the proffered evidence is relevant and overrule Tucker's objections. Therefore, EBC exhibits EBCX 1-27, US Steel Exhibits USX 1-16 and ACE Exhibits ACX 1-9 have all been admitted. In addition, EBC was granted leave at the July 25, 2002 hearing to offer the testimony of Alice Conger by post-hearing deposition. The deposition was taken and the transcript offered as EBCX 28 within the time allowed, and no objection was heard. Accordingly, EBCX 28 has also been admitted.

B. Background and Tucker's Employment History[4]

[4] Tucker's Social Security earnings records which are in evidence as CX 5(bb), reflect that he worked for dozens of employers over the years, mostly as an ironworker out of a union hiring hall. Since there is no evidence or argument that any of this employment, with the exceptions of his work for EBC, US Steel, SSS and TVS, was covered by the Act, the summary of his work history will focus on the dates and nature of his employment with the four employers named as respondents.

Tucker was born in Norfolk, Virginia on September 20, 1942, making him 61 years of age at the present time. He finished the tenth grade in school and worked as a meat cutter and restaurant porter in the Norfolk area before relocating to Connecticut in 1962. CX 4(a) at 4-5 (Transcript of Deposition taken October 24, 1996); TR 70. After arriving in Connecticut, he worked briefly in a restaurant and as an automobile repairman in New London. *Id.* at 10-12. He was then hired by EBC on January 17, 1963 to work as chipper/grinder and, later, as a tank tester aboard submarines. *Id.* at 12-13. He testified that during his employment at EBC, he was exposed to airborne asbestos from asbestos insulating blankets that were used as heat and spark protection during welding and grinding operations and from asbestos-insulated "strip heaters" used in the welding process. *Id.* at 15-18; TR 194-196. He was laid off by EBC in December 1965 for missing too much time from work. CX 4(a) at 19.

Over the next 20 years, Tucker worked for a large number of employers, primarily as a welder, boiler maker and ironworker, and he also engaged in self-employment. His Social Security earnings records (CX 5(bb)) and Ironworker's employment records (EBCX 25) were introduced in evidence as Tucker acknowledged some confusion regarding the precise dates and chronological sequence of his employment. ALJX 26 at 115-117. The Social Security records show that Tucker worked for SSS during portions of five years – 1965, 1969, 1973, 1974 and 1978. CX 5(bb). Tucker testified that in 1965 and again in 1969, he worked in SSS's shop in Hartford, Connecticut where he did welding and chipping and grinding work. TR 71; ALJX 26 at 112.

In 1968, he returned to EBC for two months between March and May. He testified that he underwent training as a welder at a machine shop in Mystic, Connecticut and did not actually work in EBC's Groton, Connecticut shipyard. At the end of the training, he was not satisfied with the pay level in which he was placed by EBC, and he voluntarily terminated his employment. CX 4(a) at 19-20, 24-25. He then went to work out of an Ironworkers local union hiring hall in Hartford, Connecticut. *Id.* at 25-26.

In the early to mid-1970s, Tucker was employed by both US Steel's American Bridge Division and SSS on two major construction projects which involved the erection of a new Gold Star Bridge on which Interstate Route 95 crosses over the Thames River between New London and Groton, Connecticut and the partial demolition and improvement of the existing bridge over the same span. TR 73-74.

From 1971 to 1972, Tucker worked for US Steel's American Bridge Division on the construction of the new Gold Star Bridge. CX 4(a) at 31-32; ALJX 26 at 42-43 (Transcript of Court-supervised deposition taken on May 29, 2001); CX 5(bb). Tucker described the work environment on the bridge as dusty and dirty. CX 4(a) at 32. He said that he worked on the bridge, on "platform floats" which are work platforms hung from the steel structure of the bridge and, occasionally, aboard barges which were used to move bridge components from the shoreline into the river from where they were lifted into place on the bridge. *Id.* at 32-33; ALJX 26 at 55-59. He testified that he did welding on this job without a mask, and he stated that he now

believes that he was exposed to asbestos in the welding rods and to paint fumes. ALJX 26 at 46-48. His later work for American Bridge in 1974 was on another project in Pittsburgh. ALJX 26 at 59-60.

During 1973 and 1974, Tucker worked for SSS on the partial demolition and widening of the old Gold Star Bridge. TR 72-74; CX 4(a) at 41; ALJX 26 at 111. He did welding and demolition work, and he used pneumatic tools. ALJX 26 at 75-76. Tucker testified that he later learned through research the electrical cables and paint used on this job contained asbestos. ALJX 26 at 75. He worked for SSS on the bridge job until 1974 and could not recall whether he worked aboard any barges or vessels during this period of employment. *Id.* at 79-80, 117.

In 1973, 1974, 1976 and 1977, Tucker had periods of employment with TVS. CX 5(bb); CX 4(a) at 38-39. He testified that some of his work for TVS was performed as a welder in a steel fabrication shop which is located in New London, approximately two hundred or three hundred feet from the Thames River. ALJX 26 at 66-67. Tucker stated that the TVS fabrication shop was located on a street and that there was a City of New London trash facility, a crane company and a beer distributor located on the other side of the street, between TVS and the river. TR 199-200; ALJX 26 at 131. A residential neighborhood lies on the other side of the TVS property, heading away from the river. TR 200. The welding work that Tucker did in the TVS fabrication shop was on tanks and other components that TVS manufactured for EBC to be installed aboard submarines. TR 186-187; ALJX 129-130. Tucker stated that he never saw boats or barges come through the TVS steel fabrication facility, and he had "no idea" how the tanks and other components manufactured for EBC were transported from the TVS facility in New London to the EBC shipyard in Groton. TR 185-186, 198; ALJX 26 at 130-131.

Tucker also worked for TVS as an ironworker on outside contracts including modification and repair work on overhead cranes which were located above the dry docks in both the South and North yards at EBC's shipyard in Groton. ALJX 26 at 68-71; TR 79, 184-185, 192. He stated that this work for TVS at the EBC shipyard occurred early in his TVS employment, probably in 1973. TR 197. He also stated that he was exposed to asbestos from strip heaters used by welders who were working around him during the time that he was working for TVS in the EBC Groton shipyard as well as when he was welding submarine components for EBC in the TVS steel fabrication shop. TR 191-192; ALJX 26 at 129. Tucker testified that during his employment at TVS, he worked exclusively in the New London steel fabrication shop unless he was working "outside" as an ironworker such as when he worked on the overhead cranes at the EBC Groton shipyard. TR 184-185. At his deposition in 1996, Tucker testified that he was not to his knowledge exposed to asbestos while he worked for TVS. CX 4(a) at 39-40. However, at the deposition in May 2001, he testified that he was exposed to asbestos dust while working in the TVS shop where strip heaters containing asbestos insulation were used to warm the metal components he welded. *Id.* at 71-72; 113-114. He was questioned about this change in testimony and responded that he had been instructed by his attorney in 1996 not to mention asbestos exposure at TVS. ALJX 26 at 112-113. He further testified that he later came to

believe through research that he had been exposed to asbestos from welding rods and paint while working for TVS. *Id.* at 73. While employed by TVS, Tucker used air-powered grinders which vibrated, and he testified that it is his belief that he was exposed to silica from the grinding wheels that he used at TVS and at EBC. *Id.* at 86-87; TR 192. He also testified that he was exposed to sandblasting dust in the shop at TVS and in a shop at EBC without any breathing protection. *Id.* at 88-89; TR 192-193.

Tucker testified that he returned to EBC in 1976 when he took a welding test but "refused to work for them because they wouldn't pay me first class rate." ALJX 26 at 64, 101. He said that he was paid for the time that he took the test and thought that he may have been exposed to asbestos through the welding rods. *Id.* at 65. He further stated that although the welding test only lasted a few hours, he was at EBC for a total of about three days during time which he filled out papers and attended a safety course in preparation for being rehired. *Id.* at 101-104. He also produced an EBC document, which is in evidence as EBCX 1, stating that he received an "A" rating in structural welding from EBC in June 1976.

Alice Conger, a workers' compensation claims adjuster employed by EBC, testified at a deposition that she is very familiar with EBC's hiring process as well as its employment and welding certification records based on her EBC work experience since 1973 in various capacities including welder, welding instructor, employment representative with responsibility for recruiting and hiring tradesmen and light duty coordinator and case manager. EBCX 28 at 5-8. She testified that prior to being hired by EBC, an applicant must undergo a pre-employment physical, drug screen, and security clearance check, and EBC does not deviate from this protocol due to strict requirements imposed by the federal government. *Id.* at 9, 59. Contrary to Tucker's testimony that he was "rehired" by EBC when he took the welding test in 1976, Conger testified that Tucker was not employed by Electric Boat any time after 1968. *Id.* at 14. Conger explained that if Tucker had been employed by EBC after 1968, his employment records would have reflected rehire and severance dates. *Id*. at 18. Additionally, she testified that the records would contain a security clearance form and a physical examination record on file which are absent for the time period in question. *Id.* at 19. Conger further testified that there are no records that EBC paid any wages or benefits to Tucker at anytime during the 1970s, and she testified that if Tucker had been employed at EBC, even for a brief period of time in 1976, there would be a record of payment. *Id.* at 20. She said that her conclusion that Tucker was not employed by EBC in 1976 is confirmed by the records including EBCX 2 and 3 which show that Tucker did not report for his physical. *Id.* at 24-25. Conger testified that EBC made Tucker an offer of employment as a second-class welder at a rate of approximately $5.73 per hour in December 1976, but Tucker refused the offer and failed to report for his scheduled physical on December 20, 1976. *Id.* at 24, 50-51, 53. Conger was questioned about the June 1976 EBC record of a welding rating certification, and she testified that the welding test referenced in the certification was not part of EBC's hiring process and instead was generally given to workers who were already employed by EBC in order to qualify them for particular welding processes. *Id.* at 15, 22, 35, 49, 51. She said that in Tucker's case, the qualification test most likely given during his employment with TVS which worked as a sub-contractor to EBC in 1976. *Id.* at 32-34, 50-52. Conger further testified

anyone who worked for TVS on EBC components had to be tested and certified by EBC for meeting qualification standards established by the Navy. *Id.* at 58.

Based on Conger's clear and specific testimony, and noting Tucker's admitted confusion over the details of his employment history and the absence of any record that EBC paid him any wages or benefits in 1976, I find that it is more likely than not that the welding testing that Tucker underwent at EBC in 1976 was done in connection with his employment by TVS to work on submarine components produced by TVS under contract with EBC. Accordingly, I conclude that Tucker was not employed by EBC in 1976.

Tucker's Social Security records show that subsequent to his employment by TVS, he returned to work for SSS in 1978, earning reported wages totaling $1,929.38. CX 5(bb) at 2. Tucker was unsure at his deposition in May 2001 and again at the hearing in September 2001 and July 2002 where he worked for SSS in 1978 and what he did. At the deposition, he initially testified that he "probably" worked on the bridge for SSS in 1978, but he later testified that he did not believe that he worked on any bridge job for SSS in 1978. ALJX 26 at 112, 116-117. At the hearing on September 26, 2001, he testified that he did not know where he worked for SSS during 1978: "I could have worked on a bridge. I could have worked on a building." TR 82-83. At the hearing on July 25, 2002, he testified, "78, that had to be that I worked on the bridge." TR 154. However, he later said that he did not have any recollection where he worked for SSS in 1978, although he said that he could have been called back to SSS in 1978 to do "some repair work . . . some rod work or whatever." TR 169-170, 173. He also testified at length during the July 25, 2002 hearing about his work for SSS on the Gold Star Bridge and consistently identified this work as being done in 1973 and 1974. TR 155, 158, 160, 163, 166-167.

The Social Security records further show that in addition to working for SSS in 1978, he worked for several other employers and also reported income from self-employment. CX 5(bb) at 10-11. He testified that he continued to work as an ironworker after leaving SSS on building foundation and power plant construction jobs. TR 86-92. He did a lot of welding on these jobs and said that he was exposed to welding fumes, but he could not specifically recall any exposure to asbestos. TR 92.

Lastly, The Social Security records show $1,532.00 in reported income from self-employment in 1978, $20,649.00 in 1979 and $3,212.00 in 1981. CX 5(bb) at 11. In addition, these records show earnings of $25,900.00 in 1980 and $5,216.00 in 1981 from Tucker Surface Restoration, Inc. *Id.* Tucker testified that Tucker Surface Restoration was his own business which did highway construction, installation of retaining walls, tunnel work, restoration of old buildings and graffiti removal. ALJX 26 at 119-120; CX 4(a) at 43-44. He testified that some of the work that he did involved a cleaning process in which chemicals or acids were brushed onto a surface and then washed off with a high pressure washer. He stated that this process created a mist, but he denied any exposure because he always wore a respirator. ALJX 26 at 120-121. He then formed another business with a partner, Tucker and Abe Associates, but testified that this venture never did any work. *Id.* at 118-119. Although not reflected as earnings in his Social

Security records, Tucker testified that he received a payment of $133,000 in 1985 from Savin Brothers for which Tucker Surface Restoration did retaining wall and graffiti removal work. ALJX 26 at 121-124.

Tucker testified that his business became defunct sometime in the early 1980s before his health deteriorated in 1985, causing him to stop work completely. CX 4(a) at 47-48. He filed for Social Security disability benefits at that time and has been receiving disability payments of approximately $1,000.00 per month since 1986. TR 69. His Social Security records reflect that he was found to be totally disabled as of February 15, 1985 due to chronic ulcerative colitis, arthritis and diabetes. CX 2(d).

C. Timeliness of the Claims

EBC, TVS and SSS all raise statute of limitations defenses to Tucker's claims, arguing that he did not file within two years of the date he either became aware, or through the exercise of reasonable diligence should have been aware, of the relationship between employment and the alleged occupational diseases that form the bases of his claims. Section 20(b) of the Act creates a presumption that a claim was timely filed, and the burden falls on the employer to demonstrate otherwise. *See Bath Iron Works Corp. v. U.S. Dep't of Labor*, ___ F3d. ___, 2003 WL 21665024*4 (1st Cir. July 17, 2003) (*Knight*); *Horton v. General Dynamics Corp*., 20 BRBS 99, 102 (1987). *See also Blanding v. Director, OWCP*, 186 F.3d 232, 235 (2nd Cir. 1999) (applying the section 20(b) presumption to the section 12(a) requirement that an employee provide timely notice of an injury).

The Act contains a one-year limitation period for filing claims based on an injury and a two-year limitation period for claims based on an occupational disease. Both periods begin to run on the date when the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment and the injury or disease, or within one year of the date of the last payment of compensation, whichever is later. 33 U.S.C. § 913(a) (injury limitation period) and § 913(b) (occupational disease limitation period). It is the unanimous view of every court to consider the issue that the Act's limitation periods begin to run "only after the employee becomes aware or reasonably should have become aware of the full character, extent, and impact of the injury", and the courts "generally have held that the employee is aware of the full character, extent, and impact of the injury when the employee knows or should know that the injury is work-related, and knows or should know that the injury will impair the employee's earning power." *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 134 (6th Cir. 1996), citing *Abel v. Director, Office of Workers Compensation Programs*, 932 F.2d 819, 821 (9th Cir.1991); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 27 (4th Cir.1991); *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 294-95 (D.C. Cir.1990); *Brown v. Jacksonville Shipyards, Inc*., 893 F.2d 294, 296 (11th Cir.1990); *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 1033 (D.C. Cir.1987); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 1141-42 (5th Cir.1984); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 401-02 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982). *See also Bath Iron*

Works Corp. v. Galen, 605 F.2d 583, 585 (1st Cir.1979) (interpreting identical language in 33 U.S.C. § 912 which contains the Act's notice of injury requirement).

The respondents generally concede that the section 13(b) two-year limitation period for claims arising from occupational diseases is applicable to Tucker's claims. An occupational disease has been defined as "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." *Gencarelle v. General Dynamics Corp*., 892 F.2d 173, 176 (2nd Cir. 1989), quoting 1B A. Larson, THE LAW OF WORKMAN'S COMPENSATION §41.00 at 7-353; *Carlisle v. Bunge Corp*., 33 BRBS 133, 136 (1999), *aff'd, Bunge Corp. v. Carlisle*, 227 F.3d 934 (7th Cir. 2000), citing *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 160 (5th Cir. 1997). As discussed above, Tucker suffers from lung disease, thoracic outlet syndrome, arthritis and multiple organ disease which he alleges to be causally connected to his occupational exposures to asbestos and other injurious industrial chemicals and compounds and to his repetitive use of vibratory tools such as chippers and grinders. In my view, and no respondent suggests otherwise, the harmful conditions alleged by Tucker to be the causes of his diseases are not typical of employment generally but rather are present to an increased degree in the chipper/grinder, welder and ironworker trades in which Tucker was employed.[5] Therefore, I find that the section 13(b) limitation period is applicable to Tucker's claims.

In support of their statute of limitations defense, the respondents point to Tucker's testimony that he had disabling lung symptoms in 1985 and the medical records which predate his claims. Tucker testified at his 1996 deposition that he had experienced shortness of breath since 1985 and could not walk more than two flights of stairs without running out of breath. CX 4(a) at 75. He also testified that he later sought an evaluation in 1993 from Martin Cherniak, M.D., M.P.H., an occupational health specialist, on the recommendation of a friend "who knew that I had all these illnesses, so he told me that maybe I should go over and talk to Dr. Cherniack, being that I worked at Electric Boat." *Id.* at 73-74.

Records from the Lawrence and Memorial Hospitals indicate that Tucker was admitted on May 21, 1985 with a 20-year history of colitis, recent weight loss and arthritis that had progressed in severity to the point of requiring hospitalization. At the time of admission, he gave his occupation as ironworker and reportedly denied any history of exposure to chemicals. USX 4 at 1. Upon evaluation, the treating physician's assessment was an apparent systemic inflammatory condition, presently predominated by arthritic manifestations. *Id.* at 4. There is no mention in

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[5] Although not specifically raised by any of the respondents, I have considered whether Tucker's diagnosis of work-related, disabling degenerative arthritis of the knees; *see* CX 2(a); qualifies as an occupational disease in light of *Gencarelle's* holding that synovitis of the knees is not. However, Tucker's work as a welder an ironworker, which involved significant amounts of climbing, crawling and kneeling on hard surfaces such as structural steel according to his uncontradicted testimony, is markedly different from the routine type of everyday walking and standing involved in *Gencarelle*.

these hospital records of any occupational factors. In July of 1985, he had a series of chest x-rays and pulmonary function tests which showed pneumonia and a "a poor inspiratory effort with pleural thickening and tenting at the cardiac apex." CX 2(s).

The Lawrence and Memorial Hospitals records further show that Tucker returned to the occupational health clinic in March 1993 for an evaluation by Dr. Cherniack. In a letter to Tucker dated April 1, 1993, Dr. Cherniack stated that he had been seen "on referral from a coworker for evaluation of effects concerning your past exposure to asbestos." CX 2(e) at 2. Dr. Cherniack advised Tucker in this letter that the results of pulmonary function tests were "consistent with a pattern of restrictive lung disease" which he described as "certainly a pattern which is consistent with interstitial lung disease and may be seen in the setting of asbestos-related interstitial lung disease." *Id.* at 3. Dr. Cherniack concluded: "In summary, you have clear, and in my view, indisputable evidence of asbestos-related pleural disease with scarring in the lower lobe lining due to your past exposures to asbestos." *Id.* After Tucker underwent a CT scan of his chest at Dr. Cherniack's suggestion, Dr. Cherniack informed him in a letter dated July 7, 1993 that "[t]he pleural plaquing which is a finding associated with asbestos exposure that was seen on the x-ray was also seen on the CT." *Id.* at 1.

Dr. Cherniack's April 1, 1993 letter to the Claimant is the first medical report which links any of Tucker's medical conditions to his past employment. Although Tucker knew that he was sick and disabled in 1985, and although he may have suspected that occupational factors might have played a role in the development of his severe and complicated medical conditions, I find that the April 1, 1993 is the earliest possible date when Tucker could have been aware of the full character, extent and impact of his condition. Tucker's first claim was filed on May 18, 1993 against EBC and on May 24, 1993 against TVS, well within section 13(b)'s limitation period. Although the additional claims were not filed until March of 2000, I find that these claims were also timely filed because none of the respondents have produced any evidence that Tucker was aware, or should have been aware, prior to March of 2000 that claims should be asserted against any other employers. *See Osmundsen v. Todd Pacific Shipyard*, 18 BRBS 112, 115 (1986), citing *Smith v. Aerojet-General Shipyards*, 647 F.2d 518 (5th Cir. 1981). Accordingly, I find that none of the respondents has rebutted the presumption that the claims were timely filed has not been rebutted.

D. Jurisdiction and Responsible Employer and Carrier

TVS and SSS both contend that Tucker's claims against them should be dismissed because Tucker's employment falls outside of the Act's coverage. Specifically, TVS contends that Tucker fails to meet either the maritime "situs" or "status" test necessary to establish coverage under the Act. TVS/Hartford Closing Argument at 12-15. SSS similarly contends that Tucker's work on th Gold Star Bridge was not performed on a maritime situs covered by the Act. SSS/Liberty Mutual Closing Brief at 17-22. In addition, TVS and SSS both attempt to escape any liability by pointing fingers at each other as the last responsible employer under *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2nd Cir. 1955), *cert. denied*, 350 U.S. 913 (1955).

TVS/Hartford Closing Argument at 4-7; SSS/Liberty Mutual Closing Brief at 7-9.

1. Coverage of the Act

Since the enactment of the 1972 amendments to the Act, the question of whether an injured employee's claim for benefits is covered generally requires an inquiry into the situs of the injury (the "situs" test) and the status of the injured worker (the "status" test). *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264-65 (1977) (*Caputo*). Section 3(a) of the Act in pertinent part states that "compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a). And, section 2(3) of the Act defines a covered employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . ." 33 U.S.C. § 902(3).[6]

There are two significant flaws in TVS's jurisdictional arguments. First, in asserting that Tucker does not meet the Act's situs and status tests, it focuses exclusively on Tucker's work as a welder inside the New London steel fabrication shop, thus ignoring the uncontradicted evidence in the record that Tucker also worked for TVS at the EBC shipyard in Groton. The EBC shipyard is indisputably a covered maritime situs as the record shows that it adjoins a navigable waterway and is customarily used in the building and repair of vessels, and Tucker's repair and maintenance work on the overhead cranes used in the shipbuilding process clealy qualifies for maritime status. *See Chesapeake & Ohio Railway Co. v. Schwalb*, 493 U.S. 40, 47 (1989) (holding that workers who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act even though they were not performing work essential to the loading process when they were actually injured). Second, TVS's arguments about its steel fabrication shop and the status of the employees working in that facility on the fabrication of

[6] Section 2(3) also sets forth the following specific exclusions from coverage, none of which are applicable herein: (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work; (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet; (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance); (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this Act; (E) aquaculture workers; (F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length; (G) a master or member of a crew of any vessel; or (H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net; if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

components for use on submarines assembled at the EBC shipyard ignores clear case precedent on the situs and status questions. That is, the Benefits Review Board, in *Bonin v Thames Valley Steel Corp*., BRB Nos. 93-1943 and 93-1943A (July 30, 1996) (unpublished) affirmed the ALJ's findings that the claimant's work for TVS in fabricating parts for submarine decks and tanks conferred maritime status under section 2(3) and that the TVS New London steel fabrication shop is a covered maritime situs under section 3(a), notwithstanding its location in a mixed use neighborhood and its separation from the navigable waterway of the Thames River by a street and other businesses. Slip op. at 4-5. The only work that Tucker could recall doing inside the fabrication shop involved submarine components such as tanks, and TVS has offered no evidence to the contrary or otherwise distinguishing the nature of the Claimant's employment from that of the claimant in *Bonin*.[7] Therefore, I find that all of Tucker's work for TVS was performed on a covered situs and that he had maritime status during all periods of his employment by TVS.

As for Tucker's employment by SSS, the issue of whether his work on the Gold Star Bridge satisfies the situs and status requirement is controlled by the BRB's decision in *Crapanzano v. Rice Mohawk, U.S. Construction Co., Ltd.*, 30 BRBS 81 (1996). In Crapanzano, the claimant was injured while working on a bridge being constructed over a waterway. Relying on *Fusco v. Perini North River Associates*, 622 F.2d 1111 (2nd Cir.1980), *cert. denied*, 449 U.S. 1131 (1981), the BRB held that none of the claimant's work on the bridge, including some work on barges, was maritime in nature:

> Although claimant in the instant case unloaded materials from a barge, those items were for the purpose of constructing a non-maritime structure over water; therefore, his employment has no relationship to maritime commerce under the case law of the Second Circuit. *See Fusco* 622 F.2d at 1113, 12 BRBS at 332; *see also Pulkoski*, 28 BRBS at 303 (bridge construction worker not a maritime employee); *Johnsen*, 25 BRBS at 335 (bridge painter not a maritime employee); *Laspragata*, 21 BRBS at 135. Consequently, a claimant does not meet the Section 2(3) status requirement and cannot be classified as a maritime employee.

30 BRBS at 83. The BRB also noted that there was no evidence that the bridge was being constructed as an aid to navigation, and it rejected the claimant's arguments that the bridge was a covered situs, noting a long line of precedent that a bridge is an extension of the land and may not constitute a covered situs. 30 BRBS at 83-84. The record in this case shows that both the old and new spans of the Gold Star Bridge across the Thames River were constructed to carry an interstate highway. As in *Crapanzano*, the record is devoid of any evidence, aside from the

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[7] It is noted that the claimant in *Bonin*, unlike Tucker, also worked at a waterfront storage area where completed components were loaded onto barges for shipment downstream to EBC. However, this difference is immaterial in light of the BRB's holding that the fabrication shop is a covered situs and that maritime status attaches to work performed therein on submarine components. Also immaterial is Tucker's lack of knowledge as to how the completed submarine components were transported from TVS to EBC.

obvious fact that it crosses over a navigable waterway, that the bridge has any maritime purpose whatsoever. *Cf. Lemelle v. B.F. Diamond Construction Co.*, 674 F.2d 296, 298 (4th Cir. 1982) (maritime status found for bridge worker where evidence showed that the bridge, located one mile from the shoreline, would aid navigation on the James River), *cert. denied*, 459 U.S. 1177 (1983). Accordingly, I find that Tucker's employment with SSS falls outside of the jurisdiction of the Act.[8]

2. Last Responsible Employer and Carrier

The basic rule for assigning liability under the Act in occupational disease cases involving multiple employers or insurance carriers is the "last employer" or "last injurious exposure" rule which was first articulated in *Travelers Insurance Company v. Cardillo*, 225 F.2d 137, 145 (2d Cir. 1955) (*Cardillo*) ("the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering an occupational disease arising naturally out of his employment, should be liable for the full amount of the award."), *cert. denied*, 350 U.S. 913 (1955). *See also General Dynamics Corp., Electric Boat Division v. Benefits Review Board*, 565 F.2d 208 (2d Cir. 1977) (announcing the Court's continued adherence to *Cardillo*); *Carver v. Ingalls Shipbuilding*, 24 BRBS 243, 246-47 (1991) ("In occupational disease cases, the responsible employer is the employer during the last employment where claimant was exposed to injurious stimuli prior to the date on which claimant was aware or should have been aware of the relationship between his *disability*, disease and his employment."). This case presents the not unusual situation where the most recent injurious exposures took place in employment outside of the Act's coverage. *Cardillo's* last employer doctrine was subsequently modified to address this type of situation in *Todd Shipyards Corp. v. Black*, 717 F.2d. 1280 (9th Cir. 1983), *cert. denied* 466 U.S. 937 (1984). In *Black*, the Court developed a "last covered employer" rule under which that last employer *covered by the Act* to expose a worker to injurious stimuli is held liable for any benefits awarded under the Act. 717 F.2d. 1285. *See also Stilley v. Newport News Shipbuilding and Dry Dock Co.*, 33 BRBS 224, 225-26 (2000) (following *Black's* last covered employer rule), *petition for review denied sub nom Newport News Shipbuilding and Drydock Co. v. Stilley*, 243 F.3d 179 (4th Cir. 2001).

In view of my finding that Tucker's employment with SSS is not covered by the Act, it is clear that TVS, which employed Tucker until 1977, is the last covered employer for these claims. In making this finding, I credit Tucker's testimony that he was exposed to asbestos, welding fumes, industrial dust from sandblasting, and repetitive use of vibrating tools during the course of his employment with TVS. Tucker's admitted prevarication at the 1996 deposition where he denied exposure to asbestos at TVS is troubling, but I am satisfied from my observations of Tucker's demeanor during the court-supervised deposition in May 2001 and on the witness stand in September 2001 and July 2002 that his testimony in this regard is trustworthy. Moreover, I

[8] Though it is not necessary to reach this issue, it would appear that Tucker's employment with U.S. Steel is also outside the coverage of the Act.

find it significant that TVS made no effort to introduce any contrary evidence showing that Tucker did not experience the injurious exposures described in his testimony.

Based on foregoing, I find that TVS and Hartford, as the insurance carrier on the risk as of the date of Tucker's last employment with TVS, are the responsible parties who must bear liability for any benefits awarded to Tucker under the Act.

E. The Merits of Tucker's Claims

TVS and Hartford contend that Tucker has not established a *prima facie* case of a compensable injury or occupational disease. TVS/Hartford Closing Argument at 15. While conceding that he may suffer from a lung impairment, upper extremity abnormalities and gastrointestinal and neurological problems as he has alleged in his claims, they assert that "he has not proven that they were, in any way, caused by his employment." *Id.* at 18 (underlining in original).

3. Occupational Disease and Causal Relationship to Employment

Tucker bears the burden of persuasion by a preponderance of the evidence on all facts necessary to establish his claim; *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 275-76 (1994); but he is helped by section 20(a) of the Act which creates a presumption that a claim comes within its provisions. 33 U.S.C. § 920(a). The section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). To invoke the presumption, there must be a *prima facie* claim for compensation, to which the statutory presumption refers; that is, a claim "must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, OWCP*, 455 U.S. 608, 615 (1982). A claimant presents a *prima facie* case by establishing (1) that he or she sustained physical harm or pain and (2) that an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988).

As TVS and Hartford readily acknowledge, Tucker has clearly established that he has suffered physical harm. There is an abundance of medical records which document a long history of medical problems which include a lung impairment, arthritis, thoracic outlet syndrome and inflammatory bowel disease. In addition, he has introduced medical evidence which connect some of these conditions to his past employment. On October 6, 1994, Tucker's treating rheumatologist, Joseph Craft, M.D. who is affiliated with the Yale University School of Medicine, reported that Tucker suffers from inflammatory arthritis related to his inflammatory bowel disease and degenerative arthritis of the knees which he described as job-related and 50% disabling. CX 2(a) at 3. In a letter dated June 8, 1994 to Tucker's attorney at the time, Kim E. Koyamatsu, M.D., M.S.P.H. of the Occupational Health Center at the Lawrence and Memorial Hospitals,

reported on the results of evaluations of Tucker's neck, hand and arm symptoms that were done in November 1993, January 1994 and May 1994. Dr. Koyamatsu stated that Tucker had evidence of ulnar neuropathy due to thoracic outlet syndrome, tension neck syndrome and clinical depression. He also stated that he "would not say that Mr. Tucker's neck and upper extremity problems including his thoracic outlet syndrome are work-related" in view of Tucker's past history of severe inflammatory bowel disease with associated arthritis, his body habitus and the length of time between his last work at EBC and 1993 when he reported to the Occupational Health Center with upper extremity problems." CX 2(m) at 1-2. Dr. Koyamatsu further stated,

> As you probably know, thoracic outlet syndrome as well as tension neck syndrome may or may not be work-related depending on the circumstances of each vase. I do not believe in Mr. Tucker's case these are work-related problems.

Id. at 2. Dr. Koyamatsu also noted in his letter that Tucker had been evaluated by Dr. Cherniak based on his past asbestos exposure, and he stated that in the absence of any evidence of asbestosis on the CT scan, Tucker had no permanent lung impairment "since pleural plaques in and of themselves do not cause impairment." *Id.* at 1. On September 28, 1994, Amy Hopkins, M.D., M.P.H., from the Occupational Health Center wrote to Tucker to summarize the results of a visit on September 21, 1994. CX 2(i). She stated that he suffered from ulcerative colitis, enteropathic artritis, diabetes mellitus, schlerosing cholangitis with cirrhosis, chronic headaches, thoracic outlet syndrome and ulnar neuropathy. *Id.* at 1. Dr. Hopkins further stated that Tucker's chest x-ray had been interpreted by a B-reader as 0/0,[9] that it was unclear whether he had any pleural plaques and that a recent pulmonary function study showed some improvement from testing in March of 1993. *Id.* In summary, Dr. Hopkins informed Tucker that he did not have any asbestosis, and she said that she concurred with Dr. Koyamatsu's assessment that he did not have any permanent lung impairment secondary to asbestosis. *Id.* at 2. She noted that Dr. Cherniak had previously concluded that Tucker suffered from asbestos-related pleural disease but deferred on the question of asbestosis until Tucker underwent a CT scan which showed no definite evidence of asbestos-related disease and no definite plaques. *Id.* She concluded that Tucker could return to the Occupational Health Center in three years for further examination to determine if he had developed any asbestos-related disease. *Id.*

Tucker also introduced a report of an evaluation by Maria C. Trape-Cardoso, M.D., an assistant clinical professor of medicine at the University of Connecticut Health Center, Division of Occupational and Environmental Medicine, to whom he was referred by Ironworkers' Local 15. CX 5(ww). Dr. Trape-Cardoso"s impression was that Tucker had many severe chronic medical problems "with a recent preoccupation about exposures at work between the 60s and the 70s."

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[9] A certified "B-reader" is a physician who has demonstrated designated levels of proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. §37.51; *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 146, n. 16 (1987), *rehearing denied*, 484 U.S. 1047 (1988).

Id. at 7. She stated that Tucker should be on an asbestos surveillance program due to his prolonged exposure to the substance in the past, and she stated that he had enough medical problems to explain his symptoms of malaise and disability very well. *Id.* at 7. Dr. Trape-Cardoso did not specifically address the causes of Tucker's multiple conditions.

In addition to Dr. Trape-Cardoso, Tucker sought an opinion on the etiology of his inflammatory bowel disease, arthritis and diabetes from Charles Ebhohimen, M.D. and Oyebode A. Taiwo, M.D., M.P.H. of the Yale University School of Medicine's Occupational and Environmental Program. In a letter dated March 2, 1998, Drs. Ebhohimen and Taiwo advised Tucker that "[a] literature review done revealed no association between inflammatory bowel disease and any occupational or work exposure" and "[y]our complications of arthritis and diabetes are as a result of inflammatory bowel disease and treatment with Prednisone." CX 2(g).

Finally, Tucker introduced a report from Dr. Cherniak dated July 1, 1999 based on an evaluation on May 28, 1999. CX 2(b).[10] Dr. Cherniak noted that the overall pattern of lung function testing was reduced in 1993 and had changed little over the intervening six years, and he added that there has been "significant pleural plaquing, a sign of asbestos related exposure on your examination." *Id.* at 1. He also noted that a CT scan in August 1998 showed minimal changes and some interlobular thickening, but not in a distinctive pattern. *Id.* Dr. Cherniak observed that Tucker's "overall evaluation had been complicated by the diagnosis of primary biliary cirrhosis and sclerosing cholangitis which occurred in the setting of ulcerative colitis" and that Tucker had "raised the question of whether environmental exposures may have produced these conditions which are of very unclear etiology." *Id.* He continued that Tucker's case was further complicated because of large and small joint pain, and he stated that the "representative or proportional elements of inflammatory joint disease due to [Tucker's] underlying medical problems and to traumatic exposures at work are difficult to sort out." *Id.* Dr. Cherniak then reviewed Tucker's occupational histories, test results and findings on physical examination, and he stated that there are three considerations in Tucker's case: (1) interstitial lung disease; (2) large joint disease; and (3) potential adverse effects of pneumatic tools. *Id.* at 2. Regarding Tucker's lungs, Dr. Cherniak stated that he has "rather clear-cut evidence of restriction" based on his pulmonary function testing which showed a 25% impairment of each lung, and he stated that the presence of pleural plaques with this level of restriction is "strongly suggestive of an interstitial process" despite the relative unremarkable CT scan. *Id.* He further stated that there are a small number of cases in which a very mild restrictive impairment has been associated with ulcerative colitis, particularly where there is biliary tree involvement, but he attributed the "bulk of [Tucker's] restrictive lung disease to asbestos related exposures rather than to an underlying inflammatory process due to the ulcerative colitis" given Tucker's significant asbestos exposure and low DLCO test results. *Id.* Dr. Cherniak next considered Tucker's large joint, vasospasm and small fiber nerve loss problems. However, he declined to provide impairment ratings on the

[10] At the time of this evaluation, Dr. Cherniak was a professor of medicine at the University of Connecticut and was affiliated with the university's Occupational and Environmental Health Center. Dr. Cherniak also evaluated Tucker there in 1998. CX 5(ww) at 1-2.

large joint disease without input from Dr. Craft on the contribution of inflammatory arthropathy, or on Tucker's hand and arm problems because of his concern that Tucker would not be able to tolerate the diagnostic testing needed to properly assess these conditions. *Id.* at 2-3. Dr. Chreniak concluded,

> To summarize, I believe there is good evidence that you have interstitial lung disease, which I think is best understood by past exposures to asbestos and this can be attributed to a 25% impairment of the whole person. There are significant large joint limitations, which also carry impairment, although I would like Dr. Kraft's [sic] opinion as to the contribution of inflammatory arthropathy to this disorder. It is indeed possible that you have pneumatic tool related hand/arm vibration syndrome, but I believe this would be very difficult to assess given your current physical condition. I would recommend that we hold off on it for the current time and consider perhaps testing in the future.

Id. at 3.

While Tucker's evidence on the etiology of his lung impairment is conflicting, I have given greater weight to the medical opinions from Dr. Cherniak in view of his better historical perspective of Tucker's condition. Accordingly, I find that the weight of Tucker's evidence establishes that he suffers from interstitial lung disease which is due, at least in part, to his past occupational exposures to asbestos including his exposures while employed by TVS. Accordingly, I find that he has invoked the presumption that his lung condition is causally related to his employment. I further find on the basis of Dr. Craft's opinion that Tucker has successfully invoked the presumption that his degenerative arthritis of the knees is causally related to his employment including his employment by TVS. Finally, I find that Tucker had offered insufficient evidence to invoke the presumption with respect to any of his other conditions as there is no medical opinion linking any of these conditions to occupational factors. Indeed, Tucker's own evidence from Drs. Koyamatsu, Ebhohimem and Taiwo goes against any causal relationship.

Since Tucker has invoked the presumption of causation with respect to his lung and knees conditions, the burden shifts to TVS and Hartford to produce substantial evidence proving the absence of or severing the presumed connection between these conditions and his employment. *DelVecchio v. Bowers*, 296 U.S. 280, 286-287 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2nd Cir. 1981). Evidence is "substantial" if it is the kind that a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000). *See also Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 289 (5th Cir. 2003) (rejecting requirement that an employer "rule out" causation or submit "unequivocal" or "specific and comprehensive" evidence to rebut the presumption and reaffirming that "the evidentiary standard for rebutting the

§ 20(a) presumption is the minimal requirement that an employer submit only 'substantial evidence to contrary.'").

TVS and Hartford offered no evidence in response to Tucker's claims. However, EBC introduced medical evidence in response to Tucker's claims which must be considered as it is relevant to causation. *See* 20 C.F.R. § 702.338; *Williams v. Marine Terminals Corp.*, 14 BRBS 728, 732 (1981). Specifically, EBC offered medical reports from two physicians who respectively addressed the work-relatedness of Tucker's knee and lung conditions.

Robert L. Fisher, M.D., an orthopedic surgeon, examined Tucker on February 1, 1999 with reference to his complains of knee pain. EBCX 12. Dr. Fisher took Tucker's work history and noted that he had done extensive climbing and crawling. *Id.* at 1. Aside from some observed difficulty squatting and a small effusion on the left knee, Dr. Fisher's physical examination was unremarkable. *Id.* at 2. He also reviewed x-rays of Tucker's knees and reported that they appeared normal. *Id.* at 2. He stated,

> I can find no evidence of significant arthritis in this man's knees. He has a small effusion in the left knee. I certainly do not look on this as a workers' compensation case. There is no history of a specific injury to any of his joints and certainly any synovitis that he might have could easily be explained by his chronic bowel disease or other factors. From a strictly orthopedic standpoint, I cannot see any reason why this man could not seek some gainful employment at this time.

Id. at 2-3. In my view, Dr. Fisher's opinion, which is based on a physical examination and x-rays, that Tucker has no work related knee problem qualifies as substantial evidence that rebuts the section 20(a) presumption. Therefore, the presumption falls out of the case, and the record must be evaluated as a whole to determine whether causation is established by a preponderance of the evidence. *John W. McGrath Corp. v. Hughes*, 264 F.2d 314, 317 (2d Cir. 1959), *cert. denied*, 360 U.S. 931 (1959). Based on my review of the record as a whole, I conclude that causation has not been established. The only evidence in favor of causation is Dr. Craft's unexplained statement that there is a job-related degenerative arthritic component to Tucker's knee condition. While sufficient to invoke the presumption, I find that Dr. Craft's opinion is easily outweighed by the specific and documented findings from Dr. Fisher. Consequently, I conclude that a preponderance of the evidence of record fails to establish that Tucker's knee condition is related to his employment.

Michael B. Teiger, M.D., who is board-certified in internal and pulmonary medicine and a certified B-reader; EBCX 27; reviewed Tucker's medical records and his May 2001 deposition testimony for EBC's attorneys and reported his opinions, which he restricted to pulmonary issues, in a letter dated July 15, 2002. EBCX 26. He pointed out that he had not had the opportunity to examine Tucker or personally review his chest x-rays and CT scans, but he stated that he believed that he had a "reasonably complete overview of the medical and legal issues involved in this case and can render an opinion based on this review." EBCX 26 at 1. Dr. Teiger stated that he was in

"direct disagreement" with Dr. Cherniak in that "[i]t is my opinion that Mr. Tucker has no asbestos related lung disease . . . [and] I do not think that Mr. Tucker has any claim for pulmonary disability on any basis and do not think that there is any relationship between his pulmonary status and occupational exposure of any kind." *Id.* at 1. Dr. Teiger stated that he based his opinion on the following factors:

> 1. There is a fairly insignificant history of exposure to any significant asbestos material in this man's occupational history. While there may have been casual exposure over the years as may occur in any construction related job, he was not in any occupation that generated asbestos dust to such a degree to warrant concern for developing asbestos related lung disease.
>
> 2. No *medical* records were present to document any claims for respiratory distress, difficulty or dyspnea over the years. He has never been hospitalized for, nor seen as an out — patient for any pulmonary related difficulty.
>
> 3. No physician has documented rales in the lungs on examination.
>
> 4. All radiographic reports have been singularly unimpressive for asbestos related disease. A single "B" reader report from Dr. Harren in 1998 claimed abnormalities in a CXR on Type s/s and profusion 1/0. This is a very soft claim, and has not been substantiated by other observers or in subsequent more sensitive, high-resolution chest CT scans.
>
> 5. Claims for the presence or absence of pleural plaques are also not clear to me but, while some observers claim plaques to be present, the latest high resolution CT scan of the chest in 1998 fails to document any plaques. Even if a pleural abnormality is present on the left, it could be explained by the fact that Mr. Tucker underwent a rib resection in the left chest for drainage of a subphrenic abscess in 1985 and this episode could easily have caused pleural scar from pleural infection entirely unrelated to asbestos exposure.
>
> 6. Pulmonary function data suggests the presence of mild restrictive physiology which has not progressed through the 1990's. While *one* cause of restriction is asbestosis, Mr. Tucker's condition is more likely than not related to lung disease associated with his inflammatory bowel disease, his biliary cirrhosis, or his episode of sepsis when he had his bowel perforation from the Crohn's. All of these conditions could have been causally related to an interstitial lung process and all might be inactive and non-progressive at this point.
>
> 7. He had an Anti Nuclear Cytoplasmic Antibody (ANCA) titer positive in 1994 at 1:40 with a pen-nuclear pattern seen. This is a finding of questionable significance but is *not* a finding seen in asbestos related lung disease. Its presence in the blood

> may reflect another underlying, nonoccupational pulmonary process. To the best of my review, I have not seen any more recent study in this regard, but I think that this finding also argues against this man having asbestos related lung disease.
>
> 8. There has been no progression of pulmonary "disease" over the years. Asbestosis usually is progressive in nature and there is no evidence to support that this is the case in this man over several years.
>
> 9. There is no documentation of preceding pulmonary conditions in the past and Mr. Tucker was apparently a non-smoker. We therefore, do not know whether any of the pulmonary issues stated were new or date back to a previous time — such as occuring during the time of his sepsis from bowel perforation.

Id. at 2-3 (italics in original). Dr. Teiger concluded that Tucker's major medical problems have been Crohn's disease, enterocutaneous fistula, biliary process, headaches and arthritis, and "[e]xcept for the arthritis related to repetitive motion (which I personally will not comment on in this report), none of these medical issues is work related." *Id.* at 3.

I find that Dr. Teiger's opinions on the nature and causes of Tucker's lung condition, albeit forcefully stated, do not constitute substantial evidence to rebut the presumption. First, Dr. Teiger is in somewhat of a disadvantageous position in comparison to Dr. Cherniak because he never examined Tucker and never personally reviewed the x-rays or CT scans. In my view, this is significant because of the conflicts in the interpretation of the x-rays for the presence of pleural plaques, and Dr. Teiger's failure to personally review the films raises some doubt as to the reliability of his statement that any pleural abnormality "could be explained" by Tucker's history of rib resection and his suggestion that Tucker's other conditions all could account for his interstitial lung disease. Additionally, it is well-established that it takes more than suggestions of alternative causes to successfully to rebut the presumption. *See Williams v. Chevron USA, Inc.*, 12 BRBS 95, 98 (1980). Second, Dr. Teiger's statements that Tucker had a "fairly insignificant history of exposure to any significant asbestos materials" and no more than "casual exposure over the years as may occur in any construction related job" reflects an inaccurate understanding of Tucker's exposure history in light of Tucker's uncontradicted testimony that he was regularly exposed to asbestos dust from welding blankets and strip heaters during his employment at EBC and TVS. *See also* CX 1(kk). Unsupported assumptions by a physician regarding a claimant's working conditions precludes his or her opinion from rebutting the presumption of causation. *See Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 270-271 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982); *Compton v. Pennsylvania Ave. Gulf Service Center*, 14 BRBS 472, 479-480 (1981). Moreover, even if it is assumed that Dr. Teiger's opinion is sufficient to rebut the presumption, I would nonetheless find, upon consideration of the totality of evidence without regard to the section 20(a) presumption, that causation is established by a preponderance of the evidence. In this regard, I give greater weight to Dr. Cherniak's medical opinions on the cause of Tucker's interstitial lung disease based on his greater and more accurate understanding of Tucker's occupational and medical histories and in view of his specialization in

occupational medicine. Therefore, I find that Tucker has established that he suffers from asbestos-related interstitial lung disease which is causally related to his employment at TVS.

4. Nature and Extent of Tucker's Disability

Disability is generally addressed in terms of its nature, temporary or permanent, and its degree or extent, partial or total. *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir.1990), *cert. denied*, 498 U.S. 1073 (1991). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Cor*p., 400 F.2d 649, 654 (5th Cir. 1968) (*Watson*), *cert. denied*, 394 U.S. 976 (1969); *Seidel v. General Dynamics Cor*p., 22 BRBS 403, 407 (1989). Tucker has not worked since 1984 and he has been awarded total disability benefits since that time by the Social Security Administration. His medical condition is longstanding, and there is no medical evidence that his condition is expected to appreciably improve in the future. Clearly, his disability is permanent in nature.

With regard to the extent of his disability, Tucker has the initial burden of proving that he cannot return to his usual employment. *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). A worker's usual employment is defined as the regular duties he or she was performing at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). To determine whether the Claimant has carried his *prima facie* burden of establishing that he is unable to return to his usual employment, I must compare the medical opinions regarding his physical limitations with the requirements of his usual work as a welder and ironworker. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988). There are no medical opinions which specifically discuss Tucker's work capacities and limitations for the apparent reason that no physician ever seriously considered the possibility that Tucker can return to any type of gainful employment, let alone his past labor-intensive work as a welder or ironworker, given his significant medical problems including the restrictive impairment produced by his work-related interstitial lung disease that has been rated by Dr. Cherniak as a 25% whole person disability which alone would preclude a return to Tucker's usual employment. Moreover, an employment-related injury need not be the sole cause, or even a primary factor, in a disability. It is enough to sustain a finding of compensability that an employment-related injury contribute to, combine with, or aggravate a pre-existing disease or underlying condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517 (5th Cir. 1986); *Gardner v. Director, OWCP*, 640 F.2d 1385, 1389 (1st Cir. 1981); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966).

Since Tucker has established that he is unable to return to his usual employment because of a work-related injury, the burden shifts to TVS and Hartford to demonstrate the availability of suitable alternative employment or realistic job opportunities which the Claimant is capable of performing and which she could secure if she diligently tried. *See Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2nd Cir. 1991). "[T]he employer does not have to find an actual job offer for the claimant, but must merely establish the existence of jobs open in the claimant's community that he could compete for and realistically and likely secure." *Palombo* at 74, citing *New Orleans*

(Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43 (5th Cir. 1981). No respondent has made any showing that suitable alternative employment has been available to Tucker at anytime since he stopped work in 1985. In the absence of a demonstration of suitable alternative employment, the Claimant is entitled to a finding of total disability. *American Stevedores v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976).

F. Compensation and Benefits Due

1. Compensation

Tucker seeks an award of compensation at the rate of $901.29 per week from May 21, 1985. CX 1(kk).[11] In determining the appropriate amount of compensation due, I conclude that inasmuch as Tucker may not be considered a "voluntary retiree" because the evidence establishes that he stopped work "at least in part, to his occupational disease", he is "entitled to an award based on his loss of wage-earning capacity and may therefore be entitled to permanent total disability compensation pursuant to Section 8(a) of the Act . . .". *Hansen v. Container Stevedoring Co.*, 31 BRBS 155, 157 (1997). Under section 8 of the Act, the amount of a claimant's disability compensation must be determined with reference to his average weekly wage ("AWW"). 33 U.S.C. § 908. The parties were requested at the hearing to offer evidence or stipulations regarding the applicable AWW in the event of an award of compensation, but they have declined to do so.

Because Tucker's disability is caused by an occupational disease, his AWW is calculated as of "the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability." 33 U.S.C. § 910(i). In my view, Tucker's Social Security earnings records are the best and most reliable evidence of his pre-disability wages. Since there is no evidence showing how many weeks Tucker worked and whether he worked substantially the whole of any year, and no evidence of the earnings of a comparable employee, I find that sections 10(a) and 10(b) of the Act may not be used to calculate his AWW. This leaves section 10(c) which is designed to reach a fair and reasonable approximation of the injured worker's annual wage-earning capacity at the time of the injury and where sections 10(a) and (b) would produce harsh results. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991) (*Gatlin*); *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 321 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). Section 10(c), in contrast to sections 10(a) and (b), does not limit consideration of the injured worker's earnings to the year immediately preceding the injury. *Gatlin*, 936 F.2d at 823; *Tri-State Terminals v. Jesse*, 596 F.2d 752, 756 (7th Cir. 1979). Instead, section 10(c) permits an administrative law judge to consider a claimant's earnings over a

[11] It appears that Tucker seeks the maximum compensation rate allowable under section 6(b)(1) of the Act which establishes a maximum rate of 200 percent of the national average weekly wage as annually adjusted by the OWCP. 33 U.S.C. § 906(b)(1).

period of years to fairly and reasonably calculate an average weekly wage. *Anderson v. Todd Shipyards*, 13 BRBS 593, 595-96 (1981). In my view, a fair and reasonable calculation of Tucker's AWW is best made by averaging his reported earnings in 1979 ($20,649) and 1980 ($25,900), the last two years in which he had reported wages appearing to reflect full-time employment, and then dividing this average ($23,274.50) by 52 weeks to produce an AWW of $447.59. *See Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). Based on this calculation, I find that Tucker is entitled pursuant to section 8(a) of the Act to an award of permanent total disability compensation at the rate of $298.39 per week, which is equal to two-thirds of the applicable AWW, such compensation payments to commence on May 21, 1985 and continuing until further order.

2. Interest

Tucker has received no compensation to date, and interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1982). The appropriate interest rate is the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982) which is periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. § 1961 (1982) by reference and provides for its specific administrative application by the District Director. The applicable interest rate shall be determined as of the filing date of this Decision and Order with the District Director.

3. Medical Care

An employer found liable for the payment of compensation is additionally responsible pursuant to section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). Although TVS and Hartford have applied for relief from the Special Fund, section 8(f) of the Act does not relieve an employer of its liability for a claimant's medical benefits. *Barclift v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 418, 421 (1983), *rev'd on other grounds sub nom Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295 (4th Cir. 1984); *Scott v. Rowe Mach. Works*, 9 BRBS 198, 200-01 (1978). Therefore, I find that TVS and Hartford are liable pursuant to section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of Tucker's work-related lung condition.

G. Entitlement to Special Fund Relief

Section 8(f) of the Act provides that where an employee with an existing permanent partial disability suffers a subsequent injury resulting in a total permanent disability which is not solely attributable to the subsequent injury, an employer's liability for payment of benefits under the Act is limited to no greater than a period of 104 weeks with the remaining compensation paid by a

Special Fund established pursuant to 33 U.S.C. § 944. 33 U.S.C. § 908(f); *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198, 200 (1949). To avail themselves of relief in regard to Tucker's permanent and total disability benefits, TVS and Hartford must meet three requirements: (1) the employee must have has a preexisting permanent partial disability; (2) the preexisting disability must have been manifest to the Employer; and (3) the employee's permanent total disability must not be solely due to the subsequent injury. *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 793 (2nd Cir. 1992); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1305 (2nd Cir. 1992). Thus, the permanent partial disability must predate the employment-related injury; *Mikell v. Savannah Shipyard Co.*, 26 BRBS 32, 37 (1992); and it must be sufficiently serious that it would motivate a cautious employer to discharge employee. *General Dynamics*, 982 F.2d at 796-97. A pre-existing disability is manifest "if prior to the subsequent injury, employer had actual knowledge of the condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable." *Esposito v. Bay Container Repair Co.*, 30 BRBS 67, 68 (1996). The earliest medical records in this record begin on May 21, 1984 when Tucker was admitted to the Lawrence and Memorial Hospitals. USX 4. Since TVS and Hartford have not shown that there were medical records in existence prior to Tucker's employment at TVS between 1973 and 1977, or that TVS had actual knowledge of a pre-existing disability, I find that TVS and Hartford have failed to establish that Tucker had a pre-existing permanent partial disability which was manifest to TVS. Accordingly, their application for Special Fund Relief is denied.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. Thames Valley Steel and The Hartford Insurance Company shall pay to the Claimant, Samuel Tucker, permanent total disability compensation benefits pursuant to 33 U.S.C. § 908(a) at the weekly compensation rate of $298.39 commencing May 21, 1984 and continuing;

2. Thames Valley Steel and The Hartford Insurance Company shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related lung disease may require pursuant to 33 U.S.C. § 907;

3. Thames Valley Steel and The Hartford Insurance Company shall pay to the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid;

4. The claims against General Dynamics Corporation/Electric Boat Corporation, United States Steel LLC and Standard Structural Steel are DISMISSED, and Insurance Company of North America/ACE USA, as carrier for General Dynamics Corporation/Electric Boat Corporation, and Liberty Mutual Insurance Company, as carrier for Standard Structural Steel, are DISMISSED as parties to this mater; and

5. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:dmd